

**Patterson Belknap Webb & Tyler LLP v Marcus &
Cinelli LLP**

2023 NY Slip Op 31026(U)

March 29, 2023

Supreme Court, New York County

Docket Number: Index No. 652711/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

PATTERSON BELKNAP WEBB & TYLER LLP,

Plaintiff,

- v -

MARCUS & CINELLI LLP, DAVID P. MARCUS, BRIAN L.
CINELLI, JOHN DOES

Defendants.

-----X

INDEX NO. 652711/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 154 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 146, 147 were read on this motion to/for SANCTIONS.

Motion Sequence Numbers 007 and 008 are consolidated for disposition. Defendants' motion (MS007) to dismiss the amended complaint is granted in part and denied in part.

Plaintiff's motion (MS008) for sanctions is denied.

Background

Plaintiff obtained a judgment in 2013 against non-party Barbara Stewart for over \$2 million arising out of past legal services and served her with a restraining notice in 2013. That restraining notice prohibited her from selling or transferring any property until the judgment was satisfied. Plaintiff claims that it also sent defendants, lawyers who were then representing Mrs. Stewart, a copy of the restraining notice by email. Plaintiff has not received a single payment and the judgment now exceeds \$3 million (as interest has accrued).

Plaintiff alleges that Stewart was also getting divorced at the same time and the divorce court found that she made misrepresentations about giving away jewelry and disclosing her offshore accounts. Plaintiff took a post-judgment deposition of Ms. Stewart where she testified that that she didn't have any jewelry and that her former daughter in law had taken a diamond ring. It contends that these statements were wholly untrue.

Plaintiff alleges that defendants, and specifically defendant Marcus, had actual knowledge about the plaintiff's judgment and the restraining notice and nevertheless organized and facilitated the sale of Mrs. Stewart's 24.79 carat diamond ring in 2016. Not only did he arrange to sell it, but Marcus chose to do a private sale (which the auction house purportedly advised would get much less money than a public sale); the private sale yielded \$2.375 million. Plaintiff insists defendants paid off some of Stewart's debts (including unpaid legal fees owed to defendants and others) and then deposited the remaining funds (about \$1.74 million) into an IOLA and escrow account for Stewart. It contends that defendants used the funds to make sporadic payments on Ms. Stewart's behalf, including additional payments to defendants.

Plaintiff alleges that defendants and Ms. Stewart then entered into a new retainer agreement in 2017 that included a retainer of more than \$700,000 (the remaining proceeds from the ring sale). In the retainer agreement, defendants agreed to offer legal service to Ms. Stewart specifically in connection with plaintiff's creditor action, among other matters. Plaintiff stresses that the retainer agreement did not provide any details about the scope of the work, the estimated duration of work or the estimated fees. Plaintiff asserts that it learned about the sale in 2021 while reviewing filings in a federal case between Ms. Stewart and her former daughter in law. It asserts it sought discovery from defendants about the ring sale but those efforts were rebuffed and this case followed.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Plaintiff’s Debtor and Creditor Law Causes of Action

Plaintiff’s first through third causes of action seek relief under the Debtor and Creditor Law §§ 273, 274, 275, 273-a, and 276.

“Pursuant to the version of Debtor and Creditor Law § 273 applicable at the time of the subject conveyance[s], a conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration. Pursuant to the version of Debtor and Creditor Law § 274 applicable at the time of the subject conveyances, a conveyance is fraudulent as to creditors without regard to actual intent when it is made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his or her hands after the conveyance is an unreasonably small capital. To constitute fair consideration, the value given in exchange must be fairly equivalent and proportionate to the value of the property conveyed “(*Palmerone v Staples*, 195 AD3d 736, 737-38, 150 NYS3d 723 [2d Dept 2021] [internal quotations and citations omitted]).

Section 275 “requires, in addition to the conveyance and unfair consideration elements established supra, an element of intent or belief that insolvency will result” (*Wall St. Assoc. v*

Brodsky, 257 AD2d 526, 528, 684 NYS2d 244 [1st Dept 1999] “DCL § 276, unlike sections 273 and 275, addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency. Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on “badges of fraud” to support his case, i.e., circumstances so commonly associated with fraudulent transfers “that their presence gives rise to an inference of intent” (*id.* at 529).

Defendants move to dismiss these causes of action and claim that they are not transferees or beneficiaries of the sale proceeds. They claim that they never exercised dominion or control over the funds they held in trust for Ms. Stewart. Defendants claim that they submitted documentary evidence that the sale proceeds of the ring were put in their IOLA accounts and that these funds were handled pursuant to an engagement letter. They insist the funds, which are solely controlled by the client (Ms. Stewart) were used to satisfy debts owed to defendants for their legal work. Defendants contend that plaintiff’s allegations are mere speculation. They emphasize that no lien was obtained over Stewart’s personal property and so plaintiff has no priority of rights over any payments made to defendants from the sale proceeds.

The Court denies the branches of the motion that seek to dismiss these causes of action. As an initial matter, defendants’ contentions all require the Court to adopt their view of the facts, something the Court cannot do on a motion to dismiss. The Court must take the allegations by plaintiff as true and those allegations state cognizable claims under the first, second and third causes of action.

The facts, as presented by plaintiff, show that plaintiff had a judgment against Stewart in 2013 and served a restraining notice on Stewart. Plaintiff claims it emailed this restraining notice to defendants, which defendants do not deny. That the restraining notice was only purportedly

emailed does not absolve defendants of any liability here. It might be a persuasive argument about defendants' knowledge, but the Court cannot find, as a matter of law on a motion to dismiss, that an attorney is permitted to ignore a restraining notice addressed to one of his or her clients. The Court declines to issue a ruling that an attorney can summarily ignore it under circumstances where the client is allegedly not paying a judgment.

Moreover, subsequent actions raise further questions, to be explored in discovery, about what defendants knew about plaintiff's judgment. A 2017 retainer agreement between defendants and Stewart (NYSCEF Doc. No. 139) included a retainer of \$769,493.55 that was allegedly money from the sale proceeds of the ring. And the retainer contains a curious paragraph about representation in certain matters, including for "Protection against Creditor Actions (Patterson Belknap)" (*id.* at 3). That raises questions about the purpose of the retainer agreement—was it set up to funnel the money from the ring sale to defendants so that plaintiff could not reach it or was it a routine retainer agreement? As plaintiff points out, it has long been held that the promise of future services is not fair consideration under the Debtor and Creditor Law (*Petition of National City Bank of N.Y.*, 269 AD 1040, 58 NYS2d 620 [2d Dept 1945]; *see also Sardis v Frankel*, 113 AD3d 135, 144, 978 NYS2d 135 [1st Dept 2014]) and it is an open query about the validity of this retainer agreement.

Plaintiff claims, and defendants do not dispute, that Mr. Marcus (on Stewart's behalf) sold the ring at a private sale instead of at a public auction. The proceeds were then used to pay off certain of defendants' debts and were then held in trust for Ms. Stewart. Those actions, allegedly taken with the knowledge of plaintiff's judgment, state claims for fraudulent conveyances because Ms. Stewart has not paid off any of plaintiff's judgment and is allegedly insolvent. Discovery may shed light on why defendants would choose to do a private sale, which

would allegedly yield a lower sale price, instead of a public sale. Was this part of an effort to hide the sale from plaintiff?

The Court recognizes that defendants have a divergent view of what happened here. They claim they were entitled to do work for Ms. Stewart and were entitled to get paid for that work. Defendants' claim that there was fair consideration for the ring is not a dispositive point (the Court makes no finding about the sale price of the ring). The more important issue here is whether defendants helped Ms. Stewart sell off a ring (despite the fact that she allegedly told plaintiff at a post-judgment deposition that she did not have possession of the ring) in order to help her get legal services, pay off other debts and avoid paying plaintiff's judgment, all the while taking their own fees.

It is critical to this Court's decision, although not dispositive, that defendants were the ones who sold the ring on Stewart's behalf (*see* NYSCEF Doc. No. 107 [ring retainer agreement]). This is not a situation in which a client simply deposited or transferred money to her lawyers. Instead, she tasked defendants with selling the ring, handling the sale proceeds, and making payments; plaintiff alleges that defendant Marcus issued numerous checks from the subject account. That raises a question about whether this was part of an effort to hide the sale from plaintiff (particularly because it was a private sale).

Defendants' assertion that plaintiff should have intervened in a federal case in the Western District of New York involving Ms. Stewart and her former daughter in law that concerned the ring does not compel the Court to grant the motion to dismiss. The fact is that plaintiff's complaint, if true, suggests a scheme to prevent plaintiff from recovering its judgment while Stewart possessed a valuable asset capable of satisfying, at least partially, that judgment.

The Court observes that certain cases cited by defendants, *State Farm Mut. Auto. Ins. Co. v Grafman*, 04CV2609NGSMG, 2017 WL 9482093, [ED NY 2017], *report and recommendation adopted*, 04CV2609NGSMG, 2017 WL 4217122 [ED NY 2017] and *In re Daffner*, 612 BR 630, 638 [ED NY 2020], appear to hold that an attorney does not acquire possession of funds held in an IOLA account. However, as plaintiff points out, those cases proceeded to discovery and this Court finds that should occur here, particularly because defendants received significant payments from the ring sale proceeds. This is not a situation in which defendants merely held funds in escrow and were mere conduits for the money. Certainly, plaintiffs should be able to conduct discovery to see if defendants used their status as lawyers to take advantage of trust accounts to help hide money for a client and get paid themselves while knowing full well that their client was under a restraining notice.

Defendants also raise arguments about the statute of limitations (although this relief is not included in the notice of motion). The Court rejects those claims with respect to the first through third causes of action because the purported transfers occurred within the six-year limitations period. The transfer of the proceeds took place on August 3, 2016, the retainer transfer occurred in 2017, and this matter was commenced on August 2, 2022. That the sale took place in July 2016 is of no moment because that was not the allegedly fraudulent conveyance. The conveyance occurred when defendants instructed the funds to be placed in the IOLA account and started paying off plaintiff's debts other than the debt owed to plaintiff.

Civil Contempt Claim

The Court denies the branch of the motion that seeks to dismiss this cause of action. Plaintiff points to an Appellate Division, First Department case in which an attorney was held in civil contempt for willful neglect of a restraining notice served on the clients (*In re Wimbleton*

Fin. Master Fund, Ltd. v Bergstein, 173 AD3d 401, 103 NYS3d 378 [1st Dept 2019]). In *Wimbledon*, the First Department noted that the attorney was sufficiently aware of the restraining notices, which were emailed to him (*id.* at 402). Defendants' arguments concerning purported procedural errors, that this claim cannot be asserted in this plenary action or that it did not contain the proper warning, are without merit. As plaintiff points out, it only seeks damages (it does not seek a fine or imprisonment as part of this claim).

Tortious Interference

The Court severs and dismisses plaintiff's claim for tortious interference with the recovery of a money judgment as time barred (it has a three-year statute of limitations pursuant to CPLR 214[4]). Plaintiff's opposition to this branch of defendants' motion is that defendants should be estopped from relying on the statute of limitations. But plaintiff's complaint does not allege facts sufficient for the application of the doctrine of equitable estoppel.

Plaintiff contends that if defendants had chosen to do a public sale instead of a private sale of the ring, then Sotheby's would have done due diligence and then asked plaintiff about it. That claim is far too speculative to permit the Court to toll the statute of limitations on an equitable basis. Plaintiffs do not detail collection efforts over the years and that they were thwarted or blocked from discovering what defendants and Ms. Stewart were allegedly doing with millions of dollars. Plaintiff did not adequately allege that defendants actively misled them in a way that prevented them from complying with the limitations period (*Shared Communications Services of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 325, 832 NYS2d 32 [1st Dept 2007]).

Summary

The Court observes that defendants were insistent, particularly at oral argument, that they were simply representing a client and were paid for their legal representation of Ms. Stewart. Defendants blame plaintiff for not pursuing the judgment in some other way. Those arguments are not a basis to dismiss the entire case at the pleadings stage. The fact is that plaintiff's operative pleading sets out a scheme by which defendants sold a valuable ring on Ms. Stewart's behalf and, eventually, reaped the benefits of some of those proceeds while plaintiff's judgment from years earlier remained unpaid. Discovery is necessary to assess, among other things, motives, knowledge, and the specific transactions that took place during the key time periods.

The Court also denies defendants' motion for sanctions and plaintiff's motion¹ (MS008) for sanctions. Because the Court has denied the majority of defendants' motion, sanctions are inappropriate. And the Court denies plaintiff's request for sanctions as defendants were entitled to defend against the accusations lodged against them. That they were unsuccessful is not a reason to impose sanctions.

Accordingly, it is hereby

ORDERED that defendants' motion (MS007) to dismiss is granted only to the extent that plaintiff's claim for tortious interference is severed and dismissed and denied with respect to the remaining requests for relief, and defendants shall answer pursuant to the CPLR; and it is further

ORDERED that plaintiff's motion (MS008) for sanctions is denied.

¹ Plaintiff refers to this as a cross-motion but filed a separate motion (NYSCEF Doc. No. 146). Although plaintiff's opposition is actually filed solely under MS008, the Court will overlook this apparent oversight and consider it under MS007—defendants' motion.

See NYSCEF Doc. No. 151 concerning the next conference.

3/29/2023
DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: